IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR BENCH, JAIPUR

**ORDER**

SB CIVIL WRIT PETITION NO.7120/1993

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| Assistant Engineer, Distributory Sub, Division Right Main Canal, ChambalProject, Anta Kota | **Vs.** | The Judge, Labour Court, Kota & Ors. |

Date of order : : October 11,2006

PRESENT
**HON'BLE MR. JUSTICE PREM SHANKER ASOPA**

Mr.H.V. Nandwana, Dy. GA, for the petitioner.
Mr. K.C. Sharma &
Mr.Rajeev Bandhu, for the respondents-workmen.

By the instant writ petition, the petitioner has challenged the award of the Labour Court dated 28.4.1993 (Annexure-26) mainly on the ground that reference was vague and further same become infructuous on account of taking workmen on duty during the conciliation proceedings.

2. Briefly stated the facts of the writ petition are that 7 workmen were engaged / employed on 10.11.1978 as casual labour on daily wages on the post of Beldar by the petitioner. The workmen continued to work upto 30.9.1980, but from 1.10.1980 they refused to perform

the work of excavation in the Right Main Canal Sub-Division Anta. It is further stated in the writ petition that the workmen absented themselves from duty w.e.f. 1.10.1980. On 3.10.1980, letters were sent by some of the workmen namely Ramkishan, Ravinder Kumar, Ratan Singh and Kishorilal to the Assistant Engineer alleging that they were not permitted to work on the site. Thereafter, on 5.10.1980, Moolchand Mistri of Distributory Sub-Division, Anta wrote a letter to the Assistant Engineer informing that the workmen Ratan Singh, Ram Kishan and Prahalad working under him had not come to duty. It is further stated by the petitioner that on 8.10.1980, the Assistant Engineer informed the workmen Ratan Singh, Ram Kishore and Prahalad that since they are not attending the duties, they would be treated as willful absentee from duty. On 9.10.1980, the workmen sent letter to the Assistant Engineer complaining that despite their reporting on duty they are being marked as absent. On 15.10.1980, notice was issued by the Assistant Engineer to the workmen for joining the work. On 16.10.1980, a letter was sent by Moolchand Mistri to the Assistant Engineer reporting that the workmen had not reported on duty from 1.10.1980 to 16.10.1980. On

24.10.1980, show cause notice was issued by the Assistant Engineer to the workmen informing as to why action against them should not be taken under Rule 27 (5) and 26(5) of the Work-Charge Rules, 1964 for remaining willful absent from duty voluntarily. On 6.11.1980, the workmen approached the Joint Labour Commissioner and a notice was issued by the Joint Labour Commissioner to the petitioner for reporting before the Conciliation Officer. During conciliation proceedings, the workmen have been allowed to join the duty. On 4.8.1981, the Assistant Engineer informed the Conciliation Officer that the workmen have reported on duty and they have been taken back on muster-roll. The workmen worked from March-April, 1981 to August/September, 1981 for about 77 days to 114 days. From August/September, 1981, workmen again absented from duty. On 27.2.1982, the Conciliation Officer gave failure report and the dispute was referred to the Labour Court, Kota by the Government. The reference dated 1.10.1982 made by the Government is as under:-

> "क्या सहायक अभियन्ता, डिस्ट्रीब्यूटर उपखण्ड दाई मुख्य नहर चम्बल प्रोजेक्ट, अन्ता जिला कोटा द्वारा उनके श्रमिक सर्वश्री रविन्द् कुमार शर्मा, रामकिशन, योगेन्द्र कुमार, प्रहलाद, किशोरीलाल, कंवरलाल व रतन सिंह पेट्रोलियम बेलदारों को

(जिनका प्रतिनिधि जिला मंत्री, भारतीय मजदुर संघ, कोटा द्वारा किया गया है) सेवासे पृथक करना उचित एवं वैध है यदि नहीं तो श्रमिक किस राहत को पाने का अधिकारी है?"

3. The workmen filed statement of claim before the Labour Court, Kota and reply was also filed by the petitioner.

4. The workmen in their statement of claim clearly mentioned that their services have been retrenched on 1.10.1980 and the dispute is for the retrenchment made on 1.10.1980. On 1.10.1980, they have completed more than 280 days in services and their services have been retrenched without one month's notice or pay in lieu of notice and compensation, resulting in violation of mandatory provisions of Section 25-F of the Industrial Disputes Act, 1947 (hereinafter to be referred as "the Act of 1947").

5. In reply, the petitioner – Management has admitted two years' service of the workmen upto 1.10.1980 and further in reply to para 3 & 5 of the statement of claim, they have specifically admitted 240 days of service in last preceding one year till 1.10.1980, but the case of the petitioner- Management was that the

present case will not be covered by retrenchment and the workmen themselves have not attended the work and further the department has not made any retrenchment in the year 1980. Otherwise also, subsequent period of August/September, 1981, when the workmen again not reported on duty after joining in March/April, 1981 during conciliation proceedings, such subsequent period of service is relevant for calculation of 240 days.

6. In support of their case, the workmen Kishorilal, Prahalad, Yogendra Kumar, Kanwarlal, Ravindra Kumar, Ramkishan and Ratan Singh filed their affidavits and they were cross examined by the petitioner - Management. The petitioner – Management filed affidavits of B.N.P. Rajvanshi, Raghunath Singh, Nahar Singh, Moolchand, Nand Singh & Ranjeet Singh and they were cross examined by representative of workmen.

7. The petitioner – Management in para 5 of writ petition mentioned some facts of the subsequent mass retrenchment in Chambal Project wherein 7 persons senior to the respondents workmen have also been retrenched and this Court has upheld the retrenchment vide judgment dated 15.9.1983 (Annexure-25) in SB

civil writ petition No.1107/1983 and two other writ petitions, but there is no reference of the said judgment in the Labour Court's order, which clearly reveal that neither the said order dated 15.9.1983 was placed on record and exhibited nor the same has been referred at all. Otherwise also, the Labour Court is to proceed on its record and to gave a finding as per the evidence and provisions of Industrial Disputes Act, 1947.

8. The Labour Court answered the reference in affirmative by holding that the present case is not of abandonment of service but is of retrenchment and while holding so, the Labour Court has relied upon on a letter of Mistri dated 30.9.1980 wherein he after naming the workmen has clearly stated that these workmen have been removed and their attendance be not recorded, so until the order of Assistant Engineer of taking back them in service is not received, he is unable to mark their attendance. The Labour Court has further considered the contradiction in the reply and the evidence that in reply it has only been said that they have not reported on duty whereas in evidence all the witnesses have been instructed to depose that these workers were earlier in plantation, but when

they were asked to work for excavation, they have not reported on duty. Finally, the Labour Court came to the conclusion that it is a case of retrenchment and provisions of Section 25-F of the Act of 1947 have been violated and ordered to reinstate all the workmen with 50% back wages considering the fact of their job prospects during pendency of proceedings.

9. The submission of counsel for the petitioner is that in the reference order, there is no mention of the date of termination, therefore, the same is vague. Further submission of counsel for the petitioner is that the Government failed to consider this aspect of the matter that during conciliation proceedings, the workmen were taken on duty in March/April, 1981, therefore, there was no need for any reference. Mr.H.V. Nandwana counsel for the petitioner also submits that subsequently workmen have worked from March/April, 1981 to September, 1981 and the said period is less than 240 days, therefore, they are not entitled for any relief. On merit, the submission of counsel for the petitioner is that the present case is of abandonment of service and not of retrenchment. In para 15 of the writ petition, the petitioner has raised the plea of mass retrenchment in Chambal

Project w.e.f. 31st May, 1983, but no such plea has been raised before the Labour Court, although the award was passed approximately after a decade.

10. Both the counsel for the respondents-workmen submit that mere fact of taking back the respondents-workmen in service in March/ April, 1981 during conciliation proceedings and further not allowing them to work from August/September, 1981 without withdrawing the earlier termination dated 1.10.1980 and further grant of consequential benefits, it cannot be held that workers were estopped from continuing the conciliation / reference / Labour Court proceedings. Further submission of both the counsel for the respondents-workmen is that the petitioners were aware of the fact that the dispute is of the termination on 1.10.1980 and during conciliation proceedings, they have again reinstated the workmen, therefore, it was clear in their mind that the reference is only for the termination dated 1.10.1980. Otherwise also, the issue of vague reference cannot be taken at appellate stage. Counsel for the respondents-workmen have also submitted that assuming for the sake of arguments without admitting the same, even if it is taken to be a case of willful absent from service then also the

enquiry was necessary. Lastly, counsel for the respondents submit that Court should be slow to interfere in the finding of the Labour Court.

11. I have gone through the record of the writ petition and further considered rival submissions of the parties.

12. The submission of Mr.Nandwana, counsel for the petitioner that actual date of termination is September, 1981, cannot be accepted for the simple reason that in March/April, 1981 to August/September, 1981, the workmen were simply taken back on duty during conciliation proceedings and no settlement was arrived at before the Conciliation Officer. Moreover, the order dated 1.10.1980 of verbal termination was neither withdrawn nor the benefit of length of service and back wages from 1.10.1980 to March/April, 1981 was given to them nor the same will validate the aforesaid termination. The parties were well aware that the dispute was with regard to order dated 1.10.1980 as would be evident from the statement of claim and its reply and further no prejudice was caused to the petitioner. Otherwise also, no application /representation was moved by the respondents-workmen

after September, 1981 before the Conciliation Officer, therefore, the question of consideration of the fact of termination in September, 1981 was neither before the Conciliation Officer nor before the Labour Court. The Government has rightly referred the issue on 1.10.1982, on application / representation dated 6.10.1980 filed before the Conciliation Officer and in statement of claim/ reply, evidence before the Labour Court, the first date of termination of which the dispute was raised was 1.10.1980. On the issue of counting 240 days backwards from the last preceding one year from the date of termination, the law is well settled. As per counsel for the petitioner, the relevant date is August/September, 1981 when the respondents again stopped coming to the department, whereas as per the workmen the dispute is of not taking on work from 1.10.1980. Mr.Nandwana in support of his submission cited a judgment of Supreme Court in case of **Mohan Lal V/s Bharat Electronics Ltd. – (1981) 3 SCC 225** wherein it was held "240 days within a period of 12 months should be counted immediately preceding the date of terminations of the service". In the said case, there were no two termination and was only one termination and the

Supreme Court in para 14 & 15 has held that “period of 240 days within the period of 12 calendar months commencing and counting backwards from the relevant date, i.e. date of retrenchment”. As indicated above, the date of termination was 1.10.1980 and not August/September, 1981 and further the petitioner – Management itself has admitted the fact of work of 240 days immediately preceding 1.10.1980, the date of termination. The relevant portion of para 14 & 15 of the said judgment are as follows:-

> “14……. Therefore, both on principle and on precedent it must be held that Section 25-B(2) comprehends a situation where a workman is not in employment for a period of 12 calendar months, but has rendered service for a period of 240 days within the period of 12 calendar months commencing and counting backwards from the relevant date, i.e. the date of retrenchment. If he has, he would be deemed to be in continuous service for a period of one year for the purpose of Section 25-B and Chapter V-A.
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> 15. Reverting to the facts of this case, admittedly the appellant was employed and was on duty from December 8, 1973 to October 19, 1974 when his service was terminated. The relevant date will be the date of termination of service, i.e. October 19, 1974. Commencing from that date and counting backwards, admittedly he has rendered service for a period of 240 days within a period of 12 months and, indisputably, therefore, his case falls within Section 25-B(2)(a) and he shall be deemed to be in continuous service for a period of one year for the purpose of Chapter V-A.”

Therefore, In view of the aforesaid discussion, the said judgment is of no help to the petitioner. Counsel for the petitioner has cited another judgment on the issue of onus of proof of 240 days on the workman in case of **Surendra Nagar District Panchayat V/s Dahyabhai Amarsinh – (2005) 8 SCC 750**, which is also not applicable in the facts and circumstances of this case as the petitioner – Management itself has admitted period of work of 240 days immediately preceding 1.10.1980.

13. As regard submission of Mr.Nandwana of willful absent/abandonment of service is concerned, the submission of workmen is that the Mistri has written a letter on 30.9.1980, which is reproduced in the award of the Labour Court that these workmen have been removed and their attendance be not recorded, so until the order of the Assistant Engineer of taking back them in service is not received, he is unable to mark their attendance and subsequent correspondence is an after thought. Further the Labour Court has considered the contradiction that in reply to the claim petition, it has been mentioned by the petitioner that the workmen have not come back on duty

after 1.0.1980 whereas in evidence their witnesses have deposed that on earlier occasion, they were working in the plantation, which is less laborious work, but when after 1.10.1980 when they were asked to do excavation work which is more laborious, they refused to do so, therefore, the evidence of the management petitioner was not relied upon on account of variance between pleadings and proof. Otherwise also, the law is well settled on the issue of abandonment / willful absent that there cannot be automatic termination of service, first notice and then enquiry is necessary. In the show cause notice dated 24.10.1980, it has been mentioned that why action against them should not be taken under Rule 27 (5) and 26(5) of the Work Charge Rules, 1964, but admittedly no such action was taken nor any domestic enquiry was held, therefore, the present case is not of abandonment of service.

14. Counsel for the workmen has submitted that even if the workmen have been subsequently taken on duty and thereafter, they have not been allowed to work, they are not estopped from challenging the first termination made on 1.10.1980 on account of the

subsequent fact of taking back them on duty neither invalidate, nor validate the first termination order dated 1.10.1980 as neither the termination order has been withdrawn nor continuity of service / back wages have been granted / paid to them as held by Division Bench of this Court in case of **Rajasthan Rajya Pathya Pustak Mandal Jaipur V/s Industrial Tribunal & Ors. – 1989 (1) RLR 644.** The relevant para 3 of the said judgment is as follows:-

> "3. We have heard learned counsel for the parties. The clinching issue before us is whether Annexure-5 withdraws the termination of the petitioner's service made earlier and whether the award becomes inoperative on account of Annexure-5. Our answer is against the employer-petitioner. The petitioner's (sic non-petitioner's) services were abruptly terminated on 5.7.80. **If he was given a fresh appointment. The petitioner's working for one month in compliance of Order-Annexure-5 does not create any estoppel against him and he is not estopped from challenging the termination of his service made on 5.7.80. It was not at all necessary for the work-man to challenge the validity of Annexure-5, by which he was appointed again for a fixed period of one month**."
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> (emphasis supplied)

15. On the issue of vague reference, submission of counsel for the workmen is that there is no objection regarding the vagueness of the reference in the reply to statement of claim nor any writ petition against

the reference order was directly filed, therefore, they cannot be allowed to raise it for the first time in the writ petition. On this issue, counsel for the workmen relied upon the judgments in cases of **Binny Limited V/s Their Workmen and anr. – AIR 1972 SC 1975, Remington Rand of India ltd. V/s The State of West Bengal – 1973 LAB I.C. 1323.** The relevant portion of para 12 of the Supreme Court judgment in Binny Limited (supra) is as follows:-

> "..... Objection at appellate stage that an order of reference is invalid is not maintainable when Government is not a party to the proceeding and when material relating to the dispute is not available."

The relevant portion of para 4 of Remington Rand of India Ltd. (supra) is as follows:-

> ".....What the Government has to consider at the time of reference is whether at that time a dispute existed or was apprehended. **If the dispute was alive then the Government cannot refuse to make a reference on the ground that the dispute related to a period long prior thereto.** Whether the claim was belated or not is relevant only for consideration of the fact whether the dispute is really existing or reasonably can be apprehended. (1965) 1 Lab LJ 382 (Cal.) Dist.; AIR 1964 SC 1617 and 1970 Lab IC 1033. Rel. on."
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> (emphasis supplied)

16. On the issue of not allowing to raise new plea, counsel for the workmen relied upon a judgment in case

of **Administrator & Secretary, Krishi Upaj Mandi Samiti V/s Judge Labour Court, Bikaner & Ors. – 1987 (2) WLN 458.** The relevant para 2 of the said judgment is as follows:-

> "2. The first contention of the counsel for the appellant is that the initial appointment of the workman being defective, there is no question of attracting section 25(F) of the Industrial Disputes Act. The learned Single Judge has stated that this point not being raised before the Tribunal, it would not be permitted to be raised in the writ petition. The same reasoning applied with greater force in this special appeal. Learned counsel tried to contend that the point was raised before the Tribunal in a different form. **Admittedly, the point finds no mention in the Tribunal's order and it is sufficient to support the order of the learned Single Judge that it was not raised before the Tribunal. For this reason alone, this new point cannot be raised.** That apart, the admitted position is that the workmen did work continuously for more than 240 days as if he had been validly appointed. In view of this factual position, this objection is wholly unwarranted and was rightly rejected in a writ petition. The learned counsel then contended that appointment was for a fixed term on account of which section 25(F)(a) does not apply. This point does not appear to have been even raised before the learned Single Judge since it does not find place in his order. The same cannot, therefore, be permitted to be raised now. The fact of continuous service of more than 240 days being admitted the consequence naturally flowing from it must follow. In our opinion, the learned Single Judge was right in refusing to exercise the extra-ordinary writ jurisdiction in the employer's favour in the face of these admitted facts."

(emphasis supplied)

17. In the later judgment of Remington Rand of India Ltd. (supra), it has been considered that at the time of reference, dispute must be existed or apprehended. Here in the instant case, on 1.10.1982 when the reference was made, the dispute of the termination dated 1.10.1980 was in existence and even if the subsequent development is considered then also as per workmen neither termination was withdrawn nor continuity of service was granted nor back wages from 1.10.1980 were paid, therefore, subsequent fact of reinstatement and further not allowing them to work after August/September, 1981 is of no consequence on merit of reference.

18. On the issue of powers under Article 226 & 227 and its limitation, the Supreme Court in a case **Sadhana Lodh V/s National Insuance Co. Ltd. & anr. – (2003) 3 SCC 524** has held that Supervisory jurisdiction conferred on the High Court under Article 227 of the Constitution is confined only to see whether an inferior court or tribunal has proceeded within its parameters and not to correct an error apparent on the face of record, much less an error of

law. The relevant para 7 of the said judgment is as follows:-

> "7. **The supervisory jurisdiction conferred on the High Court under Article 227 of the Constitution is confined only to see whether an inferior court or tribunal has proceeded within its parameters and not to correct an error apparent on the face of the record, much less of an error of law. In exercising the supervisory power under Article 227 of the Constitution, the High Court does not act as an appellate court or the tribunal. It is also not permissible to a High Court on a petition filed under Article 227 of the Constitution to review or reweigh the evidence upon which the inferior court or tribunal purports to have passed the order or to correct errors of law in the decision."**
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> (emphasis supplied)

19. Thus, the aforesaid submissions of counsel for the workmen are correct. The Labour Court after going through the reference, statement of claim, reply and oral as well as documentary evidence, rightly held that the present case is of retrenchment made on 1.10.1980 and the provisions of Section 25-F have not been followed by not giving one month's notice or pay in lieu of payment and retrenchment compensation, therefore, the termination dated 1.10.1980 is illegal and the workmen have been reinstated with 50% back wages considering their temporary employment / agriculture work. It is clarified that the workmen,

who have been taken back on duty twice during the period of pendency of the proceedings before the Labour Court as well as this Court and paid the salary of the said period, will not be counted while calculating 50% back wages of the unemployed period. In my view, the Labour Court, Kota has acted within its parameters and the award is just, legal and proper, therefore, the same is not liable to be interfered under Article 227 of the Constitution of India.

20. Accordingly, the writ petition fails and is dismissed with no order as to costs.

**(P.S.ASOPA) J.**

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